1970

# Esther B. King v. Lawrence M. King : Appellant's Brief

Utah Supreme Court

# IN THE SUPREME CO
# OF THE STATE OF

ESTHER B. KING
*Plaintiff and Respond*

vs.

LAWRENCE M. KING,
*Defendant and Appel*

# APPELLAN

Appeal from the
of the Second
for Davis Co
Honorable Thornley

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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ESTHER B. KING
*Plaintiff and Respondent,*

vs.

LAWRENCE M. KING,
*Defendant and Appellant.*

Case No. 12056

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# APPELLANT'S BRIEF

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## STATEMENT OF THE KIND OF CASE

Defendant, appellant, husband, seeks reduction or termination of alimony obligation.

## DISPOSITION IN LOWER COURT

Defendant's motion for reduction or termination of alimony obligation was denied.

## RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the order denying modification of Decree.

## STATEMENT OF FACTS

Plaintiff, respondent, wife, filed a Complaint for divorce on September 29, 1965, alleging that the parties had no children and that they were married August 8, 1949, giving them a marriage of 16 years. (R1-4).

Pursuant to motion made by plaintiff's attorney, an order was entered allowing shortening of time and the divorce was entered October 13, 1965. (R6)

Defendant, appellant, husband, did not appeal the original decree.

The marriage was plaintiff's third, entered into when she was 37 years of age. (R60, P25, L4-5; P48, L7-8).

The sole ground for the divorce in the pleadings, (R1-4), findings, (R12, ¶4), and testimony, (R42, P4, L20-P5, L10), was that defendant in the last two to three years of marriage failed to associate with plaintiff, causing her great nervousness and distress.

The Findings of Fact for the Decree provide, (R13, ¶9), "Plaintiff is under a doctor's care for a nervous condition *and is unable at the present time to secure or hold employment,* and that it is reasonable and proper that defendant pay alimony to plaintiff for her support and care in the amount of $250.00 per month," (R13, ¶9).

Testimony given as a basis for a decree failed to consider the distribution of property between the parties.

For example, plaintiff was awarded the home of the parties on her testimony that she made the original down payment of $3,000.00 and was willing to assume the mortgage. (R60, P5, L14-P6, L11). No other figures were given to, nor asked by the trial court, at all, such as the value of the parties assets, or the total or monthly outgo, on debts defendant was required to pay. The exception was that they were required to split the bonds, but these only totaled $50.00. (R17, ¶3).

The decree of divorce split the property as follows, such evidence being established at the hearing on defendant's motion to modify the alimony award, heard July 11, 1969: Plaintiff received the home of the parties situated at 2863 South Holbrook Road, Bountiful, Utah. During the marriage plaintiff worked intermittently, mainly during strikes of defendant who was employed by Kennecott Copper. (R60, P34, L25-P35, L5; P66, L6-9). Defendant worked steadily except for union ordered strikes. (R60, P26, L5-10). Accordingly, other than plaintiff's initial investment of $3,000.00, defendant made substantially all of the contributions to the home, and provided for plaintiff and her child by one of her prior marriages. At the time of the divorce defendant valued the home at $18,500.00 market value (R60, P32, L10-15), with a mortgage thereon of $4,500.00. (R60, P31, L26-29). Plaintiff testified that the home value then was $17,500.00, (R60, P57, L18-22), and $5,000.00 was owed. (R60, P57, L11-14). Under plaintiff's statement of facts, she received an equity of $12,500.00. Under defendant's statement of facts, she received an equity of $14,000.00 She also re-

ceived the household furnishings. These were valued by defendant at $3,500.00, (R61, Def. Ex. 2). This evidence was not controverted. Other than the mortgage on the home which plaintiff assumed, defendant received the obligations of the parties in the sum of $3,617.42. (R61, Def. Ex. 2). He also received his personal effects and a pickup truck which was subject to a $2,900.00 obligation. (R60, P31, L16-19).

To July 5, 1969, defendant had paid plaintiff $10,-025.00 as alimony. (R61, Def. Ex. 2; R60, P29, L26-29). Barring the nine month Kennecott Strike of 1967, he has faithfully made full payment. Since the strike he has even paid $15.00 per month to catch up the strike caused arrearages. (R60, P31, L5-8, L19-20).

The award of alimony was apparently entered on the premise the plaintiff was unemployable due to a nervous condition which caused her hospitalization and psychiatric treatment. After the hearing, plaintiff was promptly released from the hospital. She has held three jobs since, quit them all of her own volition, and without difficulty with other employees. (R60, P62, L19--P63, L4; P67, L6-27). She has had back trouble which has been cured by a spinal fusion, her doctor reporting her as being "capable of doing everything but the heaviest of lifting." (R61, Def. Ex. 1, admitted by joint stipulation of the parties, letter June 17, 1969, page 2). She testified that she was not under medical care for her back, (R60, P48, L9-16), and that it gives her trouble only when her posture is poor. She then gets "splints." (R60, P55, L2-7). She is nervous, but this condition long preceded the decree of

divorce. She has been under the care of Dr. Diumenti, Bountiful, Utah, since 1953 or 1954, seeing him every three to four months, and receiving nerve medications for the greater part of the entire period. (R60, P65, L2-P66, L3). As she has held jobs before and after the divorce, while seeing Dr. Diumenti and taking nerve pills, and never been fired, her basic nervous condition seems not disabling. Plaintiff's own witness, Mrs. Cote, testified that plaintiff has always been emotonal. (R60, P74, L16-19). Defendant testified that to his observation plaintiff had returned to her normal condition, that is her ordinary condition prior to the break up of the marriage and her hospitalization. (R60, P33, L5-26; P34, L4-24; P35, L10-13). Plaintiff's hospitalization and psychiatric treatment have terminated. (R60, P63, L18-30).

Notwithstanding this, in the three and one-half years between entry of the decree of divorce and the petition for modification, and the 15 months between the spinal fusion and the petition for modification, plaintiff had only worked a couple of months total at three different jobs and had made only "several" other job applications. (R60, P50, L19-29).

Since her back fusion she has done such things as shovel snow, (R60, P41, L29-P43, L1; P50, L7-8), done her household chores, (R60, P62, L12-13), gone on pine nut picking trips, (R60, P16, L21-P17, L 24; P 61, L18-26), and picked fruit from trees, (R60, P16, L13-20).

The jobs she had since the divorce involved very heavy manual labor. She was the sole waitress, cook and

janitress on a restaurant night shift, (R60, P19, L3-14, grape picker, (R60, P62, L30-P63, L1), and shipping clerk taking heavy boxes from a conveyor belt, (R60, P59, L18-P60, L6). She testified that these jobs were too strenuous. The fact she would consider them and do them at all must indicate a basic physical soundness. She said that she terminated all of these employments due either to pneumonia or back trouble, all conditions from which she had since recovered. (R60, P67, L6-26).

She told a friend that she quit her two month job as a waitress because if defendant found out, he might want to reduce the alimony. (R60, P19, L15-P20, L3). During the same period defendant remained steadily employed at Kennecott Copper where he has worked for 21 years. (R60, P26, L5-10). His gross earnings at the time the Decree of Divorce was entered were $8,217.68 per year. (R60, P26, L12-16). In 1969 they were $8,712.00 per year, but his net was decreased from 1965 due to taxes. (R60, P27, L3-8, L14-20). His present monthly net income is $470.00 to $490.00. (R60, P27, L9-10). Defendant has remarried during the interim period to a woman with four children who receives only partial support from their father. (R60, P37, L3-24). As a matter of human necessity he provides in part for these children and his present wife. He testified that he has been unable to get out of debt due to the alimony requirement, the nine month Kennecott strike in 1967, and the increased cost of living. (R60, P30, L11-15, L24, P31, L4). The monthly payments on the previous obligations, which he has paid, has also kept him indebted, acquiring one debt as he re-

tires another. (R61, Def. Ex. 2). Without his remarriage, he would still be in financial difficulty. (R60, P35, L17-27). Deducting plaintiff's $250.00 per month alimony and the present $15.00 additional defendant pays on arrearages, leaves defendant a net of $205.00 to $225.00 a month. From this he must pay the $3,600.00 in outstanding obligations of the parties and their succeeding debts, make good the disastrous financial effects of the Kennecott strike, and provide in part for his present wife and her children.

Since the divorce, plaintiff has acquired an apartment in the basement of the home. She pays $50.00 a month for its building cost and rents it for $70.00 per month. (R60, P54, L6-14). She pays $86.00 monthly on the first mortgage on the home, and will have it paid off in 1972. (R60, P57, L11-14). By 1972, the costs of building the basement apartment will also be paid off. The result will be that when plaintiff is 60, she will own the home clear, and have an income producing apartment.

It should be noted that defendant's attorney, Samuel King, is not related to either party.

## POINT I

### THE TRIAL COURT ERRED IN CHANGING FROM ITS ORIGINAL POSITION ON THE PETITION TO REDUCE ALIMONY, AND ITS DENIAL OF SUCH PETITION IS NOT ENTITLED TO THE WEIGHT ORDINARILY GIVEN TO THE RULINGS OF A TRIAL COURT.

At the conclusion of the July 11, 1969, hearing, the court called counsel into chambers, and said it would give defendant a $50.00 per month alimony reduction, and further reductions based on plaintiff's earnings, and required her to make good faith efforts to find and hold employment. (R76, letter dated July 21, 1969, and R69).

Plaintiff's attorney prepared the order. (R69). The order was adverse to plaintiff's position. Her attorney would not have prepared it in that form, unless he clearly understood it to be the order of the court. The trial court failed to sign the order to otherwise act. After a passage of time, defendant's counsel petitioned the court to sign the order, (R54-56), but suggested that it be modified. Defendant's proposal, to modify the order, was that instead of reducing alimony based on plaintiff's work record that the court find a specific sum as representative of plaintiff's potential earnings and use that figure to reduce the defendant's obligations.

At the hearing on defendant's motion to have the order signed, preferably with modifications, the trial judge changed his position, and offered defendant a flat $50.00 per month reduction, on risk of having relief denied him altogether. This was on September 9, 1969. (R69, P1-3). The relief offered was not adequate so defendant refused the court's offer, and asked for the ruling originally announced by the court. The court then denied any relief. Plaintiff's counsel agreed, during this argument, that the order he originally submitted was the order the court first stated, (R67, P2, L10-28). The court denied this and said it was only a proposal of settlement

by the court if the parties agreed to it and was not an order at all. (R67, P2, L19-22).

The trial court has been inconsistent in three ways. If it originally found, as it eventually ruled, that there was no change of circumstances, why did it do the following? First, it put plaintiff in the position of facing a flat $50.00 per month alimony reduction, together with additional reductions based on her work. If there were no change of circumstances, why should the court require plaintiff to negotiate her position on alimony? Second, the original alimony was based on plaintiff's inability to work and the court ultimately found no change of circumstances. If this means the court found she was unemployable, why did it propose a stipulation for modification based on her earnings and require her to go to work? Third, if there was no change of circumstances, why did the court offer defendant at the September 1969 hearing a $50.00 reduction.

The Findings of Fact were not signed by the court until March 20, 1970. Paragraph II of the Findings states, "That the plaintiff is suffering with back problems after a spinal fusion operation on March 31, 1968, rendering plaintiff unable to bend or stoop to do things; further her back condition has rendered her unable to secure employment or hold employment. The plaintiff has been seeing Dr. Diumenti and Dr. Hess in connection with her physical and nervous condition." (R62-63). This is in flat error of fact. Plaintiff's doctor reported plaintiff able to be "capable of doing all but the heaviest lifting." (R61, Def. Ex. 1, letter June 17, 1969, page 2).

Plaintiff testified that her back trouble was not disabling, that she was no longer under medical care for it, (R60, P48, L9-16), and her only major back complaint is "splints" when her posture is poor. (R60, P55, L2-7).

There is no issue raised as to the integrity of the trial court, but its present, final, ruling simply fails to relate to its earlier actions. When the trial court heard the evidence, it proposed relief. Six months later, when pressed for a specific ruling, it denied relief. No evidence had been introduced in the interim to defendant's knowledge. Under these circumstances, the weight usually given to the findings of a trial court should not be given here. The appellate court should consider the matter on its merits. *Hampton v. Hampton,* 86 U. 570, 47 P.2d 419; 53 Am. Jur., Trials, §1140, pp. 794-795.

## POINT II

### THE TRIAL COURT ERRED IN DENYING DEFENDANT RELIEF ON ALIMONY BECAUSE THERE WERE SUBSTANTIALLY CHANGED CIRCUMSTANCES JUSTIFYING SUCH RELIEF.

30-3-5 UCA, 1953, as amended, gives the court power to modify a Decree of Divorce for the support and maintenance of the parties as shall be reasonable and necessary. 30-3-9, dealing with a guilty party forfeiting all rights has been repealed.

The trial court denied reduction or termination of alimony to defendant on the ground that he failed to show a change of circumstances. The court erred.

There were two basic changes of circumstances. The defendant had been unable to work his way out of debt because the wife got everything in the divorce decree and he got the debts. (R61, Def. Ex. 2). He would have been unable in his opinion to survive adequately financially even if he had not remarried. (R60, P35, L17-27). His remarriage presented him with four stepchildren being inadequately provided for by their natural father. (R60, P37, L3-24). His net income was reduced since the decree although his gross was increased by $600.00. (R60, P26, L16-26, P27, L3-20). The remarriage and subsequent obligations of an ex-husband are not a primary factor in any given case. It is acknowledged that he must provide for the first relationship first. However, it is a human factor and if it can be recognized without doing great harm to the other party, it should be given appropriate weight.

The second and major error of the trial court was in finding that the plaintiff's circumstances had not changed. They were changed.

When the divorce was granted, plaintiff was given alimony because she was hospitalized for psychiatric reasons. Since then she has terminated her hospitalization, psychiatric treatment and had her back repaired, and was capable of working several jobs, which were terminated only by her quitting. In 1969 she was "capable of doing anything except the heaviest of lifting." (R61, Def. Ex. 1, letter June 17, 1969, page 2).

If plaintiff chose to obtain employment, the economic problems between the parties would be resolved between the parties. She testified that her back at the present time gave her no trouble except for splints when her posture was poor. She is not under medical care for her back. (R60, P48, L9-16; P55, L2-7). She did not deny the letter of her attending physician, Dr. Hess, which indicated she could do any work except that involving the heaviest lifting. (R61, Ex. 1). She has held jobs both before and after the decree of divorce. She has never been fired from a job and has gotten along with her co-employees. (R60, P62, L19-P63, L4). She testified that she was going to work and reduce alimony, but in view of her only making "several" efforts to find employment, (R60, P50, L19-29), the genuineness of her efforts is obviously not great.

In view of the fact that this marriage was plaintiff's third marriage, and she had no children by it, and entered into it at the age of 37 and exited from it at the age of 53, it would appear that her right to alimony was based almost entirely on her inability to work or care for herself at all due to hospitalization when the divorce was heard. At the time the petition for modification was heard, she was capable of working and testified that she was looking for work, although her efforts were so intermittent that in 15 months since the spinal fusion which has cured her health condition, she had only made "several" job applications. (R60, P50, L19-29). Plaintiff also had a nervous condition, but she, her own witness, (R60, P74, L16-17), and defendant, (R60, P33, L5-26;

P34, L4-24, P35, L10-13), all testified that she had been nervous as a matter of character both before and after the decree of divorce, and that this had never cost her employment either before or after the divorce. Defendant provided for plaintiff throughout their marriage, although she worked, at her choosing, during the marriage. (R60, P34, L25-P35, L5; P66, L6-9). The facts and equities preponderate for defendant. He gave plaintiff the entire net estate of the parties at the time of the decree of divorce. This included a home equity of $12,000.00 to $14,000.00 depending on plaintiff's or defendant's figures, an uncontroverted, $3,540.00 on personal property and her personal effects. From the marriage the defendant took only a 1964 pickup truck which was encumbered, along with other obligations, in the sum of $3,617.42, all of which defendant has paid. Also since the decree of divorce through July 5, 1969, he has paid plaintiff $10,025.00 in alimony. (R61, Def. Ex. 2; R60, P29, L26-29).

In view of the established facts that plaintiff got the entire net property of the parties at the time of the divorce, that she was unemployable at the time of divorce, (R13, ¶9), but employable at the time of the petition to modify, (R61, Def. Ex. 1), and that defendant had been in debt continually since entry of the decree of divorce because his net earnings have decreased while his obligations have increased due to cost of living, debts of the first marriage and his remarriage, (R60, P30, L11-15, L24-P31, L4), the question then arises, as the basic question in the case, as to whether or not an ability of self-support acquired by a wife which was not present at the

time she obtained a decree of divorce, is grounds for a change in the amount of alimony that she is to receive.

No Utah case tests this point specifically although many state the general rule that property allocation and alimony must conform to the needs and abilities of the parties.

At common law, the rule favored plaintiff. Alimony was a permanent award to the wife representing the duty of the husband, once married, to ever after provide for his wife.

Now, alimony has had some change of character due to the general emancipation and employment of women. Some authorities hold to the common law rule, but juris by juris the rule is being changed. The change is not basic, in that equity is still done as best possible. It is simply that a divorced woman, who can work, should work if the alimony is burdensome to the husband. After all, a wife does have a choice of remedies. If she desires the protection and status afforded her by the common law, she can apply for separate maintenance. Thereby, she keeps her status as a married woman and the husband retains the obligation of her support.

The rule is best stated in *Lockhart v. Lockhart,* 259 P.385, (Wash. 1927), "In this state, where the marital relation is disturbed by the fault of the husband, the wife has a choice of remedies, she may apply for separate maintenance, or she may apply for an absolute divorce. In the former instance, it is but just that she should have

a separate share of her husband's earnings so long as he continues in his objectionable conduct. But there is in every instance what the law always favors, the hope of a reconciliation and a resumption of the marital relation. But where the wife applies for and obtains an absolute divorce, this hope is gone, and there is but little more for the court to consider than a just division of the common property. It is not the policy of the law, nor is it either just or equitable, that a divorced wife be given a perpetual lien upon her divorced husband's future earnings. She has chosen to go her own way, abandon all the obligations she assumed by her marital vows, and it is only under the most unusual circumstances that she can rightfully call upon him to continuously contribute to her support.'' In that case alimony was burdensome on the husband and the wife was making no effort to work although able to do so. The trial court granted the husband a reduction from $150.00 a month to $100.00 per month. The appellate court reduced the alimony in stages for one year and then terminated it entirely.

In the case now before the court, it would be appropriate for defendant to pay $100.00 per month to plaintiff until January 1, 1973, and alimony should then terminate entirely as at that point plaintiff will have a home clear of obligations and an income producing apartment also clear of obligations in her basement. She will then be only 60 years of age. Should her health collapse, she could of course petition the court for an increase in the alimony.

*Hampton v. Hampton,* 86 U. 570, 47 P2d 419, is the closest Utah case. There an ex-wife with a minor child was not employed. The defendant husband had re-married and had an additional child. His income was reduced from $2,100.00 per year to $1,500.00 per year. The trial court, on the husband's petition for modification, reduced his alimony from $60.00 per month to $54.00 per month. The Supreme Court further reduced it to $45.00 per month, drawing a line between the absolute needs of the wife and child and the present needs of the husband. Implicit in the judgment, in view of the reduction, is that the wife was required to help herself and not just take a free ride.

Also in support are *Lanborn v. Lanborn,* 251 P. 943, (Cal. 1926), and *Langs v. Langs,* 9 N.W.2d 705, (S.D. 1943), *Mark v. Mark,* 80 N.W.2d 621, (Minn. 1957), (holding specifically that later acquired ability of a wife to work is a changed circumstance justifying modification), and *Leavitt v. Leavitt,* 399 P.2d 33, (Cal. 1965), (also holding that ability to work, later acquired, is substantial change of circumstances justifying modification.)

Another factor the court should consider is that the original decree of divorce, although consented to by the husband, was so grossly disproportionate in its distribution of assets and obligations, that it is proper for the court to attempt, within reasonable bounds, to rectify, or at least consider, that disposition in its subsequent rulings. *Anderson v. Anderson,* 104 U. 104, 138 P. 252; *Foreman v. Foreman,* 111 U. 72, 176 P.2d 144; *Lundgreen v.*

*Lundgreen,* 112 U. 31, 184 P.2d 670, (ability to earn is a factor to be considered); *Wooley v. Wooley,* 113 U. 391, 195 P.2d 743.

Defendant respectfully submits that the ruling of the trial judge on his motion for modification was erroneous, that it was not supported by the evidence, contrary to equity, and imposes an impossible burden upon him, and no burden upon plaintiff. Accordingly he requests that his alimony be reduced forthwith to $100.00 per month, such alimony to terminate entirely January 1, 1973.

Respectfuly submitted,

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